

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74—2260

In the

United States Court of Appeals

For The Second Circuit

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., et. al.

Plaintiff-Appellees,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK, et. al.,

Defendants-Appellees.

PHARMACEUTICAL SOCIETY OF THE STATE
OF NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK & VINCENT J. MORENO,

Applicants for Intervention-Appellants.

BRIEF FOR APPELLEES

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK, et. al.,

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Of Counsel:

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STATE OF NEW YORK:

: ss.

COUNTY OF ALBANY :

Elizabeth A. Monfrini, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 633 North Pearl Street, Albany, New York 12204. That on the 22nd day of November, 1974 deponent served the within Brief upon David Goldberg, Esq., attorney for appellants, at 999 Central Avenue, Woodmere, New York 11598 and New York Public Interest Research Group, Inc. at 29 Elk Street, Albany, New York the addresses designated for that purpose by depositing two copies of the same enclosed in a postpaid properly addressed wrapper, in -- a post office-- official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Elizabeth A. Monfrini

Sworn to before me,

this 22nd day of November, 1974.

J. Michael Eady
Notary Public

J. MICHAEL EADY, Notary Public
State of New York, Albany County
Commission Expires 12/31/76

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ARGUMENT

THE PROPOSED INTERVENORS HAVE A SUBSTANTIAL INTEREST IN THIS CASE, NOT IDENTICAL WITH THAT OF DEFENDANT.

The ultimate issue in this case is the constitutionality of the prohibition against advertising prescription drug prices in New York State. The prohibition was enacted by the Legislature in 1945, (1. 1945 c. 755) and has been continued by statutes and regulations ever since. It is presently prohibited by section 63.3 (c) of the Regulations of the Commissioner of Education. Appendix p. 11a

The present issue is whether or not the Pharmaceutical Society of the State of New York, and three individual pharmacists may intervene as parties to defend the prohibition.

Plaintiffs are consumers and a consumer oriented corporation who claim standing to

contest the prohibition on the ground that it violates their rights under the First and Fourteenth Amendments to the United States Constitution, and inflates the prices they have to pay for prescription drugs. They are indirectly affected by the regulation, but claim sufficient standing and a sufficient interest to bring this action.

The proposed intervenors are pharmacists and the major society of professional pharmacists in this State. They are the people who are most directly affected by this prohibition. It affects the way they, and their competitors, can practice their profession. Removal of this prohibition could clearly have a serious adverse effect on them.

Defendant does not represent the pharmacy profession as such, or the economic interests of individual pharmacists. Defendant has the

responsibility of licensing and regulating the pharmacy profession, (Education Law sections 6506, 6507). However this responsibility is not to promote pharmacy or pharmacists, but to administer the laws and policies which have been established by the Legislature, and to do so in a manner which takes into account the legitimate interests of pharmacists and consumers, alike. The price advertising prohibition represents a long standing policy, established by the Legislature in 1945, and an accepted part of the ethical standards of the profession. Defendant expects to diligently and successfully defend it. However the proposed intervenors may wish to raise different or additional arguments, representing their specific interests as pharmacists. To that extent they may feel that their interests will not be adequately represented by defendant. Defendant does not agree, for example, with

with the suggestion on page 12 of their brief that the prohibition exists "for the very purpose of shielding independent pharmacists from destructive discount-store competition....," although we do agree that the regulation can be sustained on that basis, among others. Defendant also disagrees with paragraph 16 of the proposed answer of the proposed intervenors, and defendant does not intend to argue in favor of any such right on the part of the proposed intervenors. On the contrary, should that issue arise, defendant would argue that pharmacists have no affirmative constitutional right to a continuation of the advertising prohibition, although it may be continued in the discretion of the State Legislature and the defendant.

The question of the constitutionality of State laws or regulations prohibiting price advertising in pharmacy is a serious one and

the Court below has found that the plaintiffs have raised a substantial constitution question which necessitates the convening of a three judge federal court. Other courts dealing with the constitutionality of price advertising restrictions in pharmacy have reached different results. Patterson Drug Co. v. Kingery, 305 F. Supp. 821, (D.C. Va. 1969); Virginia Citizen's Consumer Council, Inc. v. State Board of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974); Supermarkets General Corp. v. Sills, 93 N.J. Sup. 326, 225 A2d 728, (1966); Urowsky v. Board of Regents, 76 Misc 2d 187, 349 N.Y.S. 2d 600, (N.Y. Sup. Ct. 1973); Pennsylvania State Board of Pharmacy v. Pastor, 444 Pa. 186, 272 A 2d 487; Maryland Board of Pharmacy v. Sav-A-Lot, Inc., ____ Md ____, 311 A2d 252 (1973). There are important factors present in the New York situation which were

not present in the other states, and which were consequently not taken into account in the decisions, except in Urowsky, which sustained the New York rule. Perhaps the most important difference is the distinction in New York between commercial advertising, which is prohibited, and price posting, and answering questions concerning prescription drug prices, which is not only permitted but required. Education Law section 6826, Appendix p. 10a, Regulations of Commissioner of Education, section 63.3 (m), Appendix p. 12a. In other states the advertising restriction was interpreted as prohibiting price posting and as preventing consumers from learning prices. The ultimate decision in this case may lead the way to a resolution of these conflicting decisions, and provide a new standard balancing the interests of the

consumers, the general public, the State, and the pharmacists. This case could lead to drastic changes in the pharmacy profession and in the distribution of prescription required drugs. Defendant believes that representation of the interests of the members of a profession is desirable in cases involving the manner in which the profession may be practiced. Participation by the proposed intervenors in this case might also assist the court by enabling it to hear all sides of the case.

The real subject of this action is the manner in which pharmacists may conduct their business. The interest of pharmacists in the prohibition against advertising the prices of prescriptions is more direct and far greater than the interest of consumers in attacking the same prohibition. While defendant and the proposed intervenors agree that the prohibition is constitutional, we may not agree on the way

to defend it, the justifications for it, or even the scope of the conduct prohibited by it. If consumers and a consumer organization can attack this rule regulating the conduct of pharmacists, we believe pharmacists and their professional society should be permitted to defend it.

Defendant believes that the proposed intervenors have made out a case for intervention as of right, under Rule 24 (a) of the Rules of Civil Procedure.

However the "Ninth Defense" in their proposed answer would inject a new issue into the case. It could substantially delay the case. In essence, it amounts to a claim that to permit price advertising in pharmacy but not in the other professions would somehow deny them due process under the Fourteenth Amendment to the Federal Constitution. This contention is clearly without merit, and the proposed intervenors should not be permitted to raise it.

CONCLUSION

Defendants believe the proposed intervenors have a stake in this case sufficient to justify their intervention, but that no substantial question is raised by the ninth defense set forth in their proposed answer, Appendix p. 20a. We believe that defense is entirely without merit, and could unnecessarily confuse the real issues and delay this case. Defendants urge that the motion for intervention be granted, on condition that said ninth defense be stricken from intervenors' answer.

Dated: Albany, New York
November 21, 1974

Respectfully submitted,

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